Kimden Housing Development Sdn Bhd (in liquidation) v Asia Commercial Finance (M) Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-287-1992
RICHARD TALALLA J
24 MAY 1994

Civil Procedure *— Judgments and orders — Consent order — Amendment under slip rule — Whether counsel must attend hearing in chambers — Rules of the High Court 1980 O 20 r 11 and O 32 r 16 — Practice Direction No 2 of 1989*

The plaintiff obtained judgment in default against the defendant. The defendant applied by way of summons-in-chambers before the senior assistant registrar ('the SAR') to set aside the judgment. Both counsel consented to an order for setting aside. However, unknown to them, the SAR made an order not in terms of the consent but in terms of the summons-in-chambers. Subsequently, counsel for the defendant applied to strike out the plaintiff's action pursuant to O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). At the hearing of the striking out application before the judge, both counsel agreed that the consent order should be amended under O 20 r 11, the slip rule. The learned judge directed the parties to act under O 32 r 16 with a view to saving time and costs. Both counsel subsequently appeared in chambers with respect to the application under O 32 r 16.

Held, directing that there is no necessity for counsel to appear at chambers in applications made under O 32 r 16:

(1) Under Practice Direction No 2 of 1989, a party may apply to the Registry of the High Court by post for a consent order to be made and drawn up under O 32 r 16. The judge may, in the absence of the parties, grant the application by minute on the file, and thereafter the SAR shall take steps to have the order passed and drawn up. Upon extraction of the order, the SAR will return the duplicate copy by post to the party making the application and retain the original order for filling.

(2) The plaintiff's solicitors should have served the unsealed summons on the defendant's solicitors and procured their written consent by endorsment on the summons itself or by a separate document attached to the summons. That should be filed with an affidavit of service and a covering letter referring the SAR to O 32 r 16 and requesting the SAR to refer the matter to the judge for appropriate action. Thus there would be no need for the plaintiff's solicitors to go back to the Registry a second time to obtain the sealed summons, serve it on the defendant's solicitors, and return a third time to file an affidavit of service. Order 32 r 16 read with O 32 r 1 does not require a sealed summons to be served.

A **[Bahasa Malaysia summary**

Plaintif telah mendapatkan suatu penghakiman ingkar terhadap defendan. Defendan telah memohon melalui saman dalam kamar di hadapan penolong kanan pendaftar ('PKP itu') untuk mengetepikan suatu penghakiman ingkar itu. Peguambela bagi kedua-dua pihak B telah bersetuju supaya suatu perintah pengetepian dibuat. Walau bagaimanapun, tanpa pengetahuan kedua-dua peguambela, PKP tidak membuat perintah mengikut terma yang telah dipersetujui tetapi mengikut terma di dalam saman dalam kamar. Kemudiannya, peguambela bagi pihak defendan telah memohon untuk membatalkan tindakan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah C Tinggi 1980 ('KMT itu'). Pada pendengaran permohonan untuk membatalkan tindakan plaintif, kedua-dua peguambela bersetuju bahawa perintah persetujuan itu seharusnya dipinda di bawah A 20 k 11, iaitu kaedah khilaf (slip rule). Hakim yang arif telah mengarahkan pihak-pihak supaya bertindak di bawah A 32 k 16 untuk menjimatkan D masa dan kos. Kemudiannya kedua-dua peguambela telah hadir di dalam kamar berkenaan dengan permohonan di bawah A 32 k 16 itu.

Diputuskan, memerintahkan bahawa peguambela tidak semestinya hadir di dalam kamar untuk permohonan yang dibuat di bawah A 32 k 16:

E (1) Mengikut Arahan Amalan No 2 Tahun 1989, sesuatu pihak boleh memohon kepada Pendaftar Mahkamah Tinggi melalui pos supaya suatu perintah persetujuan dibuat dan dibentuk di bawah A 32 k 16. Hakim itu boleh, semasa ketidakhadiran pihak-pihak itu, membenarkan permohonan itu dengan F mencatatkan minit di atas fail, dan kemudiannya PKP itu akan mengambil langkah untuk melulus dan membentukkan perintah itu. Apabila perintah itu dikeluarkan, PKP itu akan mengembalikan satu salinan melalui pos kepada pihak ysng membuat permohonan itu dan menyimpan salinan asal perintah G itu untuk difailkan.

(2) Peguamcara plaintif seharusnya menyampaikan saman yang tidak dimeteraikan ke atas peguamcara defendan dan mendapatkan persetujuan mereka melalui pengindorsan di atas saman itu sendiri atau melalui dokumen berasingan yang dilampirkan kepada saman itu. Kesemua dokumen itu harus difailkan dengan suatu afidavit H penyampaian dan surat iringan yang merujukkan PKP itu kepada A 32 k 16 dan meminta PKP itu supaya merujuk perkara itu kepada hakim untuk tindakan yang sewajarnya. Dengan demikian peguamcara bagi pihak plaintif tidak perlu kembali ke pejabat pendaftaran buat kali kedua untuk mendapatkan saman yang I dimeterai, menyampaikannya ke atas peguamcara defendan, dan kembali untuk kali ketiga supaya memfailkan afidavit penyampaian. Aturan 32 k 16 dibaca dengan A 32 k 1 tidak memerlukan penyampaian suatu saman yang dimeteraikan.

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 20 r 11, O 32 rr 1 and 16, O 42 rr 8, 9 and 10

Joseph Loo Shin Mun (*Shinmun & Associates*) for the plaintiff.
John Clark Sumugod (*Sidek Teoh Wong & Dennis*) for the defendant.

Richard Talalla J: On 21 February 1992 the plaintiff filed a writ of summons and statement of claim against the defendant claiming, inter alia, general damages in respect of the defendant's alleged breach of a financing agreement. No appearance having been entered, the plaintiff caused judgment in default of appearance to be entered. Prior thereto the plaintiff had applied for and obtained an order for the renewal of the writ of summons and also an order for leave to amend the writ of summons and statement of claim.

The defendant then applied by summons-in-chambers returnable before the senior assistant registrar ('the SAR') for an order that the judgment in default be set aside as well as the orders for the renewal and the amendment. At the hearing counsel for both parties consented to an order that the judgment be set aside and accordingly counsel for the defendant applied for an order in terms of the consent in the presence of plaintiff's counsel who confirmed the same.

Unfortunately, the learned SAR made an order not in terms of the consent but in terms of the summons-in-chambers. That fact was not known to either counsel at the time. Both the counsel withdrew from the chambers of the SAR bearing the knowledge that an order had been made in terms of the consent.

The defendant having the carriage of the order, its solicitors settled a draft order and sent it on to the plaintiff's solicitors for approval. Pursuant to the provisions of O 42 r 8 of the Rules of the High Court 1980 ('the Rules') the plaintiff's solicitors were required within two days of the receipt thereof or within such further time as may have been allowed by the SAR to return the draft with their signed consent or any required amendments thereto. The plaintiff's solicitors omitted to do so and accordingly, pursuant to sub-r (2) of r 8 aforesaid, they were deemed to have consented to the terms thereof. The defendant's solicitors thereafter submitted the draft to the SAR for settlement pursuant to sub-r 4 of the said Rule. The learned SAR settled the draft in terms of the summons-in-chambers and sent it back to the defendant's solicitors who, pursuant to r 9(1) of the Order aforesaid, had the order drawn up in terms of the draft as settled by the SAR and, pursuant to r 10(5) of the said Order, it was passed by the proper officer, sealed with the seal of our court and returned to the defendant's solicitors who served a copy of the same on the plaintiff's solicitors. Meanwhile the defendant's solicitors without reference to the Order applied by summons-in-chambers returnable before a judge for an order that the action be struck-out pursuant to the provisions of O 18 r 19. That summons came on for hearing before me when counsel for the plaintiff appeared and submitted that the sealed order was bad and therefore

A the summons should be dismissed. The view I took was that as long as the order remained extant I would have to have regard to it. Counsel for the defendant, having conceded that the order not being in terms of the consent was bad and both counsel having agreed that it should be amended under the slip rule, namely, O 20 r 11 of the Rules, the court drew
B counsels' attention to the provisions of O 32 r 16 and invited the parties to act thereunder with a view to saving time and costs. The said r 16 reads:

> If the Judge is satisfied that all parties to an application at Chambers have been served and have consented to the application he may in the absence of the parties or their solicitors order the granting of the application by minute on the file and the Court shall inform the applicant or his solicitors in
C writing of the Order.

Thereafter the plaintiff's solicitors settled an application at chambers and attached thereto a form of order in terms of the consent and filed the same with the Registry. The application which was in the form of a summons-in-chambers as required by O 32 r 1 was issued and returned before me.
D The plaintiff's solicitors had served a duplicate of the summons on the defendant's solicitors together with a draft order attached thereto. Upon such service, the defendant's solicitors endorsed their consent on the draft and returned it to the plaintiff's solicitors. This morning both counsel appeared before me in chambers on the summons. It seems to me that the
E very purpose of the provisions of r 16 aforesaid has been defeated. Time and expense have not been saved. As I understand it, r 16 exists in order to obviate the necessity of counsel having to appear on the application in question at chambers. Practice Direction No 2 of 1989 governs the situation. For easy reference it is set out hereunder:

F Practice Direction No 2 of 1989

Re: Consent order under O 32 r 16 of the Rules of the High Court 1980

(1) Under the above provision of the Rules a judge if satisfied that all parties to an application in chambers have been served and have consented to the application may in the absence of the parties or their solicitors order the granting of the application by minute on the file in
G which case the Court shall inform the applicant or his solicitor in writing of the order.

(2) The Honourable the Chief Justice of Malaya is concerned that the definite saving of time and expense that the exercise of the powers under the above provision offers has not generally been appreciated and taken advantage of by practitioners and judges with the result that
H much time is wasted by the parties or their solicitors attending in uncontested chamber applications.

(3) The Honourable the Chief Justice of Malaya has accordingly directed that henceforth, with the view to saving time and costs but subject to the requirements hereinafter mentioned, a party may apply to the registry of the High Court by post for a consent order to be made by the
I judge and for such order to be drawn up.

(4) The letter of application shall be accompanied by:

(a) the summons setting out fully and with sufficient precision the terms agreed upon by the parties concerned;

(b) the written consent of the parties concerned or their solicitors; the same to be signed and dated and expressly stating that each party consents to the terms agreed as set out in the summons; and

(c) if it is also desired that the consent order should be drawn up and extracted, an engrossed copy of the proposed order in duplicate stating fully and with sufficient precision the terms of the agreed order.

(5) If the requisite documents are in proper form and order, the senior assistant registrar shall place the proposed consent order before the judge for his consideration, who if he thinks fit will make the order accordingly.

(6) If the judge makes the consent order, the senior assistant registrar shall, as soon as may be practicable take necessary action for the order to be duly passed and drawn up. Upon extraction of the order, the senior assistant registrar will return the duplicate copy thereof by post to the party making the application but will retain the original order made by the judge for filling.

I will go further. What the plaintiff's solicitors could have done was to serve the unsealed summons on the defendant's solicitors and at the time of such service, by prearranged appointment, procure their written consent to the order sought therein by an endorsement of their consent on the summons itself or by a separate document attached to the summons and file the same together with an affidavit of service of the same on the defendant's solicitors accompanied by a covering letter referring the SAR to the provisions of r 16 and requesting the SAR to refer the matter to the judge for appropriate action under that Rule and complying in all respects with para 4 of the said practice direction. Thus the provisions of r 16 would have been applied by one systematic forward movement without the plaintiff's solicitors having filed the summons to backtrack to the registry a second time to obtain the sealed summons then having served the sealed summons return to the Registry a third time to file an affidavit of service of the sealed summons.

Some reservation was expressed as to the propriety of serving an unsealed copy of a summons on the defendant. Rule 16 as read with r 1 of O 32 does not require that a sealed summons be served. Seeing that the essence to the making of an order under r 16 is consent without which there can be no order, I do not see any requirement for a sealed summons to be served. Certainly service of such a summons is not envisaged by the practice direction abovestated.

I would now make the order under r 16.

Order accordingly.

Reported by Anne Khoo